2015

David and Rosemary Olsen; Dianne and William Newland; Rick Margolis, Plaintiffs/Appellants, vs. Park City Municipal Corporation, a Municipal Corporation; Valley of Love LLC, a Utah Limited Liability Company, Defendants/Appellees.

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

DAVID and ROSEMARY OLSEN; DIANNE and WILLIAM NEWLAND; RICK MARGOLIS,

Plaintiffs/Appellants,

vs.

PARK CITY MUNICIPAL CORPORATION, a Utah municipal corporation, and VALLEY OF LOVE, LLC, a Utah Limited Liability Company,

Defendants/Appellees.

BRIEF OF APPELLEE VALLEY OF LOVE, LLC

Case No. 20141193-CA

District Case No. 110500786

Appeal from the Final Order and Judgment of the Third Judicial District Court, Summit County, State of Utah, Honorable Todd M. Shaughnessy

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IN THE UTAH COURT OF APPEALS

DAVID and ROSEMARY OLSEN; DIANNE and WILLIAM NEWLAND; RICK MARGOLIS, Plaintiffs/Appellants, vs. PARK CITY MUNICIPAL CORPORATION, a Utah municipal corporation, and VALLEY OF LOVE, LLC, a Utah Limited Liability Company, Defendants/Appellees.	**BRIEF OF APPELLEE VALLEY OF LOVE, LLC** Case No. 20141193-CA District Case No. 110500786

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STATEMENT OF JURISDICTION

The Court has jurisdiction over this matter under Utah Code Sections 78A-3-102(3)(j), 78A-3-102(4), and 78A-4-103(2)(j). On January 8, 2015, the Utah Supreme Court entered an order transferring this case to the Utah Court of Appeals. (R. 310–311).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

Issue 1: Did the trial court correctly conclude that the adoption of Ordinance No. 10-08 was not illegal?

Standard of Review: The court of appeals affords no deference to a district court's review of an order of a local land use authority.[1] "Like the review of the district court, [the Court's] review is limited to whether a land use authority's decision is 'arbitrary, capricious, or illegal.'"[2]

> A land use authority's decision is illegal if it "violates a law, statute, or ordinance in effect at the time the decision was made." Because a determination of illegality is based on the land use authority's interpretation of zoning ordinances, [the Court] review[s] such determinations for correctness, but . . . "also afford[s] some level of non-binding deference to the interpretation advanced by" the land use authority.[3]

STATEMENT OF THE CASE

Appellants David and Rosemary Olsen, Dianne and William Newland, and Rick Margolis (the "Plaintiffs") challenge the adoption of Park City Ordinance No. 10-08 (the "Ordinance"), which converted three metes and bounds parcels into one platted lot of

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[1] *See Fox v. Park City*, 2008 UT 85, ¶ 11, 200 P.3d 182.
[2] *Id.* (quoting Utah Code § 10–9a–801(3)(a)(ii) (2007)).
[3] *Id.* (quoting Utah Code § 10–9a–801(3)(d); *Carrier v. Salt Lake Cnty.*, 2004 UT 98, ¶ 28, 104 P.3d 1208).

record. Plaintiffs argue that the Ordinance is illegal because it increases the buildable area on the combined parcels. The parties filed cross motions for summary judgment on the legality of the Ordinance.

The district court granted Defendant/Appellee Valley of Love, LLC ("Valley of Love") and Park City Municipal Corporation's (the "City") motions for summary judgment. In so doing, the court concluded that (1) "the material facts are not in dispute;" (2) Plaintiffs' challenge of the Ordinance as arbitrary or capricious fails; and (3) "[t]o the extent [the Neighbors] challenge the ordinance as illegal, the challenge also fails."[4] These conclusions were based on the court's determination that "[t]he adoption of Ordinance No. 10-08 did not violate Park City's Land Management Code, Park City's General Plan, or any other law, statute, or ordinance in effect at the time it was adopted."[5]

STATEMENT OF FACTS

Valley of Love owns three parcels of land on Empire Avenue in Park City, Utah. The three parcels of land all border one another.[6] The two smaller parcels border Empire Avenue, with the larger parcel landlocked behind the smaller parcels.[7] Due to setback requirements, the smaller two parcels are unbuildable.[8] Because the larger parcel does not

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[4] R. 300–01.
[5] *Id.* at 301.
[6] *See* R. 153.
[7] *Id.*
[8] R. 145.

border a public street, it is not buildable without an easement over one of the smaller parcels.[9]

In 2009, Valley of Love applied (through the City's minor subdivision process) for the three parcels to be combined as a single plotted lot of record—a requirement for Valley of Love to receive a building permit. The Park City Planning Commission reviewed Valley of Love's application and forwarded it on to the City Council with a recommendation that the application be granted. The City Council held a public hearing on the application and, after determining that the proposed subdivision complied with Park City's Land Management Code ("LMC"), approved the subdivision by passing the Ordinance.

Valley of Love also applied for a conditional use permit ("CUP") to construct low-income housing on the platted lot.[10] Plaintiffs opposed the application, voicing their opposition to the low-income housing project to the Park City Planning Commission and City Council. Eventually the Planning Commission recommended—and the City Council approved—Valley of Love's CUP application.

Plaintiffs appealed the lot subdivision and the CUP approval to the district court. The district court granted summary judgment for the City and Valley of Love in both cases.[11] Plaintiffs chose not to appeal the CUP order and the deadline to appeal that decision has long passed.

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[9] R. 165.
[10] R. 161–163.
[11] *See* May 13, 2013 Ruling and Order, *David Olsen v. Park City Municipal Corp.*, Case No. 110500209, Judge Todd Shaughnessy; R. 300–02.

SUMMARY OF ARGUMENT

This is one of two legal actions that Plaintiffs initiated in an attempt to prevent Valley of Love from building low-income housing on the property at issue. In the other action—the CUP action—Plaintiffs disputed the legality of the CUP proceedings by raising the same arguments. Because the district court reached a final judgment on the merits in the CUP action, Plaintiffs are collaterally estopped from re-hashing those issues in this appeal.

If the Court is persuaded that Plaintiffs are not collaterally estopped from re-raising these issues, the district court's ruling should nevertheless be affirmed because Plaintiffs' arguments fail on the merits. The Ordinance combined three separate metes and bounds parcels into a single lot of record. That simple action did not violate any provision of the LMC or Park City's General Plan.

Even if Plaintiffs could demonstrate that the Ordinance was illegal, their claims fail because they did not establish below that they were prejudiced by any such illegality. The Court should reject Plaintiffs' attempt for the first time on appeal to demonstrate prejudice. Plaintiffs did not preserve this argument before the district court and should not be allowed to pursue on appeal arguments that they did not give the district court an opportunity to reach.

ARGUMENT

Plaintiffs appeal the legality of a zoning ordinance—a municipal land use decision that is "generally entitled to a 'great deal of deference.'"[12] Zoning decisions are presumed valid[13] and "will not [be] interfere with . . . except in the most extreme cases."[14] Under this deferential approach, it is 'the court's duty to resolve all doubts in favor' of the municipality, and the burden is on the plaintiff challenging a municipal land use decision to show that the municipal action was clearly beyond the city's power."[15]

Plaintiffs cannot meet this burden because (1) they are collaterally estopped from bringing the very arguments they raise on appeal, (2) the Ordinance does not violate a law, statute, or ordinance in effect at the time it was passed, and (3) they failed to establish prejudice.

I. PLAINTIFFS ARE COLLATERALLY ESTOPPED FROM RAISING ARGUMENTS ADDRESSED BY THE DISTRICT COURT IN THE CUP ACTION.

Parties and their privies are collaterally estopped from relitigating facts and issues that were fully addressed in a prior suit.[16] A party is estopped from relitigating an issue (1) that is "identical in the previous action and in the case at hand, (2) that was "decided in a final judgment on the merits in the previous action," (3) that was "competently, fully, and

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[12] *Bradley v. Payson City Corp.*, 2003 UT 16, ¶ 10, 70 P.3d 47 (quoting *Springville Citizens for a Better Cmty. v. City of Springville*, 1999 UT 25, ¶ 23, 979 P.2d 332).
[13] *Harmon City, Inc. v. Draper City*, 2000 UT App 31, ¶ 7, 997 P.2d 321.
[14] *Bradley*, 2003 UT 16, ¶ 24.
[15] *Id.* ¶ 12.
[16] *Macris & Assocs. Inc. v. Neways Inc.*, 2000 UT 93, ¶ 19, 16 P.3d 1214.

fairly litigated in the previous action," and (4) where "the party against whom collateral estoppel is invoked . . . [was] either a party or privy to a party in the previous action."[17] Here, each of these requirements is met.

First, the issues are identical. Plaintiffs argue that the Ordinance violates LMC § 15-7-5(B)(1) because "the intended effect of the Ordinance was to increase the buildable square footage . . . on the aggregated lot."[18] Plaintiffs relied on the same code section, LMC § 15-7-5(B), to make the identical argument in the CUP case. There, the argument was phrased this way: "the Property [can] not gain greater density or development rights than the sum afforded to each of the separate parcels prior to their combination."[19]

Plaintiffs also argue that the Ordinance violates two of the purpose statements of LMC § 15-7-2, namely to "prevent overcrowding of the land and undue congestion of population" and "to provide the most beneficial relationship between the uses of land and buildings and circulation of traffic throughout the municipality, having particular regard to the avoidance of congestion in the streets and highways."[20] These arguments mirror those in the CUP case, where Plaintiffs argued that "the consolidation of the three lots . . . [and] the CUP violates Section 15-7-2(C) of the LMC by creating additional congestion . . . [and] by increasing congestion on streets and highways," and that a finding "that lot

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[17] *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1370 (Utah 1996).
[18] Brief of Appellants, at 8.
[19] Plaintiffs' Combined Reply, Case No. 110500209 (Mar. 4, 2013), at 5.
[20] Brief of Appellants, at 10.

consolidations should provide the most beneficial relationship between uses of land and building and circulation of traffic" was not made.[21]

Plaintiffs also presented their General Plan arguments in the CUP case. Plaintiffs argue here that the subdivision and proposed construction violates the General Plan because it is inconsistent with the General Plan's requirement that the property east of Empire Avenue "provide skier bed base *transitioning in scale* to Park Avenue . . . ,"[22] and because "it grants the Applicant the right to develop the property literally to the maximum scale allowed in the RC zone."[23] Plaintiffs made both arguments to the district court in the CUP case, arguing that "[t]he high density of the Project does not transition into lower density area from the Resort as required by the 'Resort Base' designation of the property in the General Plan," and "[t]he Project does not comply with the General Plan because it is east of Empire Avenue and therefore designated as 'Low Density Residential.'"[24]

Each of these issues was decided on the merits by the district court in the CUP case. On May 10, 2013, the district court issued a Ruling and Order granting summary judgment for Valley of Love and the City on these very claims.[25] The district court addressed Plaintiffs' arguments under the LMC provisions cited above and held that

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[21] Plaintiffs' Motion for Summary Judgment, Case No. 110500209 (Jan. 2013), at 11–12.
[22] Brief of Appellants, at 14 (emphasis in original).
[23] *Id.*
[24] Plaintiffs' Motion for Summary Judgment, Case No. 110500209 (Jan. 2013), at 15–16.
[25] *See David Olsen v. Park City Municipal Corp.*, Case No. 110500209 (May 10, 2013 Ruling and Order, at 3–4) (referred to hereinafter as the "CUP Order").

"Plaintiffs do not connect their aggregation theory to any of these ordinances, and do not demonstrate that Park City's decision to grant the CUP violates any of them."[26] The district court also found "a number of problems" with Plaintiffs' General Plan argument, including the fact that the zoning map on which Plaintiffs rely in the General Plan "is for 'illustrative purposes only,'" and that "serious doubts" existed as to "whether a General Plan, or a zoning map contained in a General Plan, rises to the level of a 'law, statute, or ordinance' upon which a finding of illegality could be made."[27] The district court ultimately found that "plaintiffs' general plan arguments . . . fail as a matter of law."[28]

These issues were fairly and competently litigated in the CUP proceedings.[29] Valley of Love and the City objected to the propriety of considering at least one of the issues in the context of the CUP proceeding,[30] but in the end, all of these issues were litigated and a final judgment entered. Plaintiffs were parties to the CUP action and involved in the litigation of these issues. Importantly, although they were aware of the

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[26] *Id.* at 4.
[27] *Id.* at 5.
[28] *Id.* at 6.
[29] *See* Plaintiffs' Motion for Summary Judgment, Case No. 110500209 (Jan. 2013), at 9–12; Pls.' Combined Reply, Case No. 110500209 (Mar. 4, 2013), at 5–6; Plaintiffs' Motion for Summary Judgment, Case No. 110500209 (Jan. 2013), at 15–16; Plaintiffs' Combined Reply, Case No. 110500209 (Mar. 4, 2013), at 7–8; Defendants' Joint Motion in Opposition of Plaintiffs' Motion for Summary Judgment, Case No. 110500209 (Feb. 1, 2013), at 14–18; Defendants' Reply Memorandum in Support of Defendants' Cross Motion for Summary Judgment, Case No. 110500209 (March 28, 2013), at 6–7.
[30] Defendants' Joint Motion in Opposition of Plaintiffs' Motion for Summary Judgment, Case No. 110500209 (Feb. 1, 2013), at 14; Defendants' Reply Memorandum in Support of Defendants' Cross Motion for Summary Judgment, Case No. 110500209 (March 28, 2013), at 8.

court's holdings in the CUP Order, Plaintiffs chose not to appeal. The deadline to appeal the CUP Order has long passed, and this Court should reject Plaintiffs' belated attempt to pursue these claims on appeal.

II. THE ORDINANCE DOES NOT VIOLATE A LAW, STATUTE, OR ORDINANCE IN EFFECT AT THE TIME THE DECISION WAS MADE.

A. The Ordinance does not abrogate or annul any restrictions in violation of LMC § 15-7-5(B)(1).

Plaintiffs argue that the Ordinance violates section 15-7-5(B)(1) of the Park City LMC. That section states in relevant part:

> These regulations are not intended to interfere with, abrogate, or annul any other ordinance, rule or regulation, statute, or other provision of law. Where any provision of these regulations imposes restriction different from those imposed by any other provision of these regulations or any other ordinance, rule or regulation, or other provision of law, whichever provisions are more restrictive or impose higher standards shall control.[31]

According to Plaintiffs, the density increase that results from combining the parcels into a single lot interferes with, abrogates, or annuls the density restrictions placed on the parcels when separate.

LMC § 15-7-5(B)(1) is the general conflict provision of Chapter 7. On its face, that provision does not preclude the subdivision of separate parcels into a single lot of record. Plaintiffs do not explain how the density increase conflicts with § 15-7-5(B)(1), except to suggest that the Ordinance, in allowing a three-parcel combination with 12,882 square feet of development, somehow "annuls" the original restrictions on the parcels that limited them

[31] LMC § 15-7-(B)(1).

to a total of 8,985 square feet (8,985 for the first parcel, and 0 for the second and third). But the restrictions are in no way annulled.

The setback restrictions preclude development of parcels below a certain size, but it does not follow that those restrictions would also prohibit combining those parcels in order to meet the criteria for development.[32] The only reason the restriction prohibits development of the smaller parcels is because they are not large enough to allow for both development and setback. But when combined with the larger parcel, the resulting lot is large enough to allow both development and setback, so the restriction's requirements are met. The LMC does not prohibit this type of subdivision.

B. The Ordinance does not violate the several purpose statements of LMC § 15-7-2.

Plaintiffs next argue that the Ordinance violates the purpose statements identified in LMC § 15-7-2. Specifically, Plaintiffs focus on LMC § 15-7-2(C) and (G), which state in relevant part: "The purpose of the Subdivision regulations is . . . to prevent overcrowding of the land and undue congestion of population . . . . [and] [t]o provide the most beneficial relationship between the Uses of land and Buildings and the circulation of traffic, throughout the municipality, having particular regard to the avoidance of congestion in the

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[32] Indeed, were the restriction interpreted to prohibit landowners from combining small, contiguous, otherwise undevelopable parcels, thus mandating they remain eternally open space and "den[ying] all economically beneficial or productive use of the land," this would likely constitute a regulatory taking, and the city would be required to provide just compensation to the landowners. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). It is unlikely the City intended this result in drafting the LMC.

Streets and highways . . . ." These two broad and generalized guiding purposes in the LMC do not render the Ordinance illegal.

Plaintiffs would have the Court view these purposes in a vacuum, without taking into consideration the zone-specific LMC provisions or the remaining purpose statements. The zone in which Valley of Love's parcels of property are located explicitly allows for "multi-unit dwellings."[33] Many of the neighboring properties, including properties east of Empire Avenue, are multi-unit dwellings.[34] These multi-unit dwellings do not violate the purposes cited by Plaintiffs because they are appropriate for the zone in which they are located. It makes sense to increase the density of buildings around the resort base. Doing so, while still obeying the density requirements for the area, provides for the most beneficial use of such an important area of the city without overcrowding the land and congesting the population.

Plaintiffs' arguments under LMC § 15-7-2(C) and (G) also miss the mark because they are based on considerations that are inapplicable to the subdivision proceeding. For example, Plaintiffs discuss at length perceived parking problems that result from the specific building that was approved through the CUP process.[35] But the type of building to be built, number of bedrooms it would contain, and the number of parking spots to be provided, were not considerations before the City Council in the minor subdivision application.

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[33] LMC § 15-2.16-2.
[34] R. 155–56.
[35] Appellants' Brief, at 11–13.

Plaintiffs' counsel recognized as much during those proceedings.[36] These are considerations applicable to the determination of whether to approve the CUP application, not whether to combine three parcels into a single lot of record. The cites Plaintiffs provide in support of this argument show as much, as they are directed to discussions and reports on the CUP applications.[37]

Even if the Ordinance violated either of the two cited purposes, this does not mean the Ordinance is illegal. Plaintiffs have the burden of showing the Ordinance "violates a law, statute, or ordinance."[38] The provisions Plaintiffs cite, however, are merely purposes behind the LMC subdivision regulations; they are not themselves regulations. These provisions of general applicability are incredibly broad; the purposes of "prevent[ing] overcrowding" and "provid[ing] the most beneficial relationship" could be used to strike nearly any subdivision. And if applied as advocated by Plaintiffs, they are necessarily internally consistent. For example, another purpose of the regulations is "to encourage the orderly and beneficial Development of all parts of the municipality."[39] The only way in which the two smaller parcels in this subdivision can ever be developed is to combine them via subdivision with a larger parcel, and this stated purpose seems to encourage such development. Surely a development that provides affordable housing in a City dependent on a robust service industry "protect[s] and provide[s] for the . . . general welfare of Park

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[36] *See* R. 121.
[37] *See* Brief of Appellants, at 11–13 (citing R. 155–86).
[38] *Fox*, 2008 UT 85, ¶ 11.
[39] LMC § 15-7-2(D).

City," in keeping with yet another purpose behind the subdivision regulations.[40] These purposes are not laws, statutes, or ordinances, upon which a finding of illegality can be made, but rather broad, guiding principles to be used in interpreting specific regulations in the LMC.

C. The Ordinance does not violate the General Plan.

Plaintiffs argue that the Ordinance is somehow illegal because it violates provisions of the Park City General Plan. But the General Plan is not a law, statute, or ordinance and, even if it were, the Ordinance does not contravene its provisions.

Plaintiffs carry the burden of proving illegality by showing the Ordinance violates a law, statute, or ordinance. The General Plan is a "guiding document" and a "long range policy plan."[41] Whereas the LMC is "law," the General Plan is merely "policy."[42] And the LMC's reference to the General Plan as a guiding document does not ordain it with the force of law. By stating as one of its "purposes" that lot line adjustments are to be made "in accordance with the General Plan," the LMC, if anything, imposes a procedural requirement.[43] And even if construed as a procedural requirement, that requirement was met, as the City found that the Ordinance was consistent with the General Plan.[44] That finding is undisputed for purposes of this appeal.[45]

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[40] *Id.* § 15-7-2(A).
[41] General Plan, at 8.
[42] *Id.*
[43] LMC § 15-7-1.
[44] *See* R. 118–19, 145–47
[45] *See* December 2, 2014 Final Order and Judgment, at 1.

Further, no part of the language Plaintiffs quote precludes the conversion of three metes and bounds parcels into a single lot of record. The Ordinance did not alter the zoning to allow for a commercial purpose and, while the combination of the parcels increased the allowed density, this aggregation conformed to the density allowed in the zone.

Plaintiffs' arguments as to the density that was eventually allowed to be constructed on the lot as a result of the City approving the CUP application are unpersuasive. Plaintiffs make much of the "*transitioning in scale*" language found in the General Plan and argue that "[t]he Ordinance is in violation with the General Plan because it grants the Applicant the right to develop the property literally to the *maximum* scale allowed in the RC zone."[46] But the Ordinance did not deal with the construction of any certain building on the lot. The density allowed on the lot was set by a separate floor area ratio determined by the LMC. The process that determined the density that would actually be allowed to be constructed on the lot was the CUP application. As has been discussed previously, Plaintiffs raised these arguments in the context of the CUP application and the litigation that stemmed therefrom, and chose not to appeal the determination reached by the district court.

The General Plan is exactly that, a general plan guiding the future development of Park City. The Ordinance is not, and cannot, be rendered illegal by its general guiding principles.

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[46] Brief of Appellants, at 14 (emphasis in original).

III. PLAINTIFFS FAILED TO ADDRESS THE PREJUDICE PRONG BELOW AND CANNOT REMEDY THAT FAILURE WITH NEW ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL.

The Utah Supreme Court has instructed that in addition to proving illegality, Plaintiffs "must establish that they were prejudiced by the City's noncompliance with its ordinances or, in other words, how, if at all, the City's decision would have been different and what relief, if any, they are entitled to as a result."[47] Plaintiffs ignored the prejudice requirement below. Recognizing the error in this approach, they rationalize their failure to preserve this argument before the district court. But the Court should reject this post hoc attempt to introduce arguments not raised below.

"As a general rule, claims not raised before the [district] court may not be raised on appeal."[48] "An issue is preserved for appeal when it has been presented to the district court in such a way that the court has an opportunity to rule on [it]."[49] "In determining whether the district court had an opportunity to rule on an issue, a court considers three factors:

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[47] *Springville Citizens for a Better Cmty. v. City of Springville*, 1999 UT 25, ¶ 31, 979 P.2d 332; *see also Suarez v. Grand Cnty.*, 2012 UT 72, ¶ 57, 296 P.3d 688 ("For us to set aside Ordinance 454 due to illegality, we must first determine that the ordinance does not comply with the terms and standards of applicable zoning ordinances already in place. Second, Citizens must establish that they were prejudiced by the [County's] non-compliance with its ordinances or, in other words, how, if at all, the [County's] decision would have been different and what relief, if any, they are entitled to as a result." (citations and internal quotation marks omitted)).

[48] *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346.

[49] *Id.* ¶ 12 (alteration in original) (internal quotation marks omitted).

'(1) whether the issue was raised in a timely fashion, (2) whether the issue was specifically raised, and (3) whether supporting evidence or relevant authority was introduced.'"[50]

It is undisputed that the first element is not met because Plaintiffs did not raise or even acknowledge the requirement that they demonstrate prejudice below. Plaintiffs first addressed this argument in their opening brief in this appeal. The second element is not met because Plaintiffs did not raise the specific issue of prejudice. Plaintiffs appear to argue that they nevertheless preserved their prejudice arguments because they "have argued from the beginning that had the City Council appropriately followed its LMC and General Plan, the lot line consolidation would have been granted with the stipulation that the square footage of the development conform to the pre-Ordinance square footage, around 9,000 sq. ft."[51] But Plaintiffs provide no record citations to support their statement that they made this argument from the beginning. As to the third element, it is undisputed that Plaintiffs did not provide the district court with any supporting evidence or relevant authority from which it could have determined that Plaintiffs were prejudiced.

On balance, a review of these factors demonstrates that Plaintiffs did not sufficiently address the prejudice argument below such that the district court had an opportunity to rule on it. Therefore, Plaintiffs failed to preserve this issue for appeal.

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[50] *Winward v. State*, 2012 UT 85, ¶ 9, 293 P.3d 259 (quoting *Warne v. Warne*, 2012 UT 13, ¶ 16, 275 P.3d 238).
[51] Brief of Appellants, at 15.

CONCLUSION

Over six years ago, Valley of Love applied through a minor subdivision proceeding to have its three parcels recognized as a single lot of record. The City Council approved that application. Since that time, the parties have repeated and re-addressed the same arguments in two separate proceedings. The Court should give finality to the district court's ruling on these issues in the CUP proceeding by recognizing that ruling's preclusive effect on this appeal. But even if the Court is persuaded to once more address these issues on the merits, it should affirm the ruling of the district court because the Ordinance is legal and Plaintiffs failed to preserve or establish prejudice.

DATED this 28th day of August, 2015.

JONES WALDO HOLBROOK & MCDONOUGH, PC

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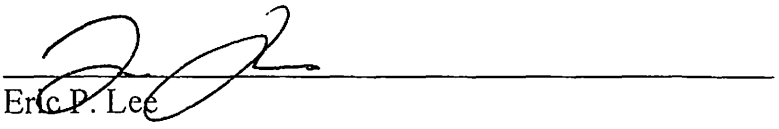
CERTIFICATE OF COMPLIANCE

I hereby certify that the word processing system used to prepare the foregoing Brief of Appellee indicates that it contains 4,335 words exclusive of (i) cover text, (ii) the table of contents, (iii) the table of citations, (iv) this certificate of compliance and (v) the certificate of service in the proportionately spaced Times New Roman font. That word count complies with the 14,000 word type-volume limitation of Rule 24(f)(1) of the Utah Rules of Appellate Procedure.

DATED this 28th day of August, 2015.

JONES WALDO HOLBROOK & MCDONOUGH, PC



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of August, 2015, I served a true and correct copy of the foregoing *Brief of Appellee Valley of Love, LLC* via email and U.S. Mail, first class, postage prepaid, to the following:

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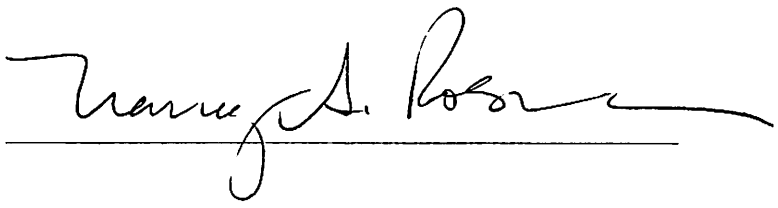

ADDENDUM

Ruling and Order dated May 10, 2013

Third Judicial District Court, Summit County, State of Utah

Judge Todd Shaughnessy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

DAVID OLSEN, et al., **Plaintiffs,** **vs.** **PARK CITY MUNICIPAL CORPORATION, et al.,** **Defendants.**	**RULING AND ORDER** **Case No. 110500209** **Judge Todd Shaughnessy**

This is an appeal from Park City Municipal Corporation's ("Park City's") approval of a Conditional Use Permit ("CUP") for property located at 1440 Empire Avenue, Park City, Utah. The parties filed with the court the record of the proceedings before Park City, and presented the merits of their appeal by cross-motions for summary judgment.[1] The motions were fully briefed and oral argument was held on April 2, 2013. Plaintiffs were represented by Bruce Baird. Defendant Park City was represented by Polly Samuels-McLean. Defendant Valley of Love, LLC was represented by Eric Lee. Following the hearing, the court took the matter under advisement. Having reviewed the record, the papers filed in support of and in opposition to the motion for summary judgment, and being fully advised, the court now rules on the motions as follows.

In reviewing Park City's decision to grant the Conditional Use Permit, this court "must presume that [Park City's] ... decision ... is valid...." Utah Code Ann. § 10-9a-

[1] The issues were presented in this fashion by stipulation of the parties. Therefore, any procedural irregularity arising out of having the issues presented by summary judgment motion is waived.

802(3)(a)(i). This court's review is limited to determining whether Park City's decision was "arbitrary, capricious, or illegal." *Id.* § 10-9a-802(3)(a)(ii); *see also id.* § 10-9a-802(3)(c) ("A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal."). In this case, plaintiffs explicitly disclaim any challenge to Park City's factual findings, and likewise disclaim any argument that Park City's decision was arbitrary or capricious. *See, e.g.,* Pl. Combined Reply Mem. at 4.[2] One consequence of this approach is that the court must accept as true all of the factual findings that are contained in Park City's February 10, 2011, final written decision.

Plaintiffs are therefore left only with the argument that Park City's decision to grant the CUP was illegal. "A determination of illegality requires a determination that the decision ... violates a law, statute, or ordinance in effect at the time the decision was made...." Utah Code Ann. § 10-9a-802(3)(d). Plaintiffs argue that Park City's grant of the CUP violates various provisions of Park City's Land Management Code ("LMC") and Park City's General Plan. Plaintiffs do not identify any statute or other law, beyond Park City's own land use and municipal ordinances, that serves as the basis for its illegality challenge. This court must "review a local agency's interpretation of an ordinance for correctness, but also afford some level of non-binding deference to the interpretation advanced by the local agency." *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 28; *see also Fox v. Park City*, 2008 UT 85, ¶ 11 ("Because a determination of illegality is based on a land use authority's interpretation of zoning ordinances, we review such determinations for correctness, but we also afford some level of non-binding deference to the interpretation advanced by the land use authority." (internal quotations omitted)). Finally, even if plaintiffs show illegality, they also must establish that they were prejudiced by that

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[2] In the briefs and during oral argument counsel for plaintiffs candidly acknowledged that plaintiffs had not met (or even attempted to meet) the marshalling requirement necessary to mount such a challenge, and also acknowledged the inherent difficulty of undertaking such a task.

illegality – i.e., plaintiffs must show "how, if at all, [Park] City's decision would have been different and what relief, if any, they are entitled to as a result." *Springville Citizens for a Better Community v. City of Springville*, 1999 UT 25, ¶ 31.[3]

Plaintiffs make three general arguments in an attempt to show that Park City's decision to grant the CUP was illegal. Each is addressed below.

Plaintiffs first argue that Park City's decision is illegal because it affords the property greater density or development rights than would be available for the combined total of the three lots that comprise the property. In other words, plaintiffs argue that the density or development rights available for the property cannot, under any circumstances, exceed the sum of the density rights that would be available if each of the three lots were developed separately and the rights associated with those three lots were combined into one. Plaintiffs do not cite any provision of the LMC that explicitly prohibits the aggregation of density or development rights. Instead, plaintiffs cite three provisions of the LMC that address lot line adjustments (LMC §§ 15-7.1-7(E)(1)(a) (repealed), 15-7-3(A), 15-7-2),[4] one which states that the "provisions of these regulations shall be held to be the minimum requirements for the promotion of public health, safety and general welfare" (LMC § 15-7-5(A)), one which references general purposes of land use restrictions (LMC § 15-7-2(G)), and one which states that "[w]here any provision of these regulations imposes restrictions different from those imposed by any other provision of these regulations or any other ordinance, rule or regulation or other provision of law, whichever provisions are more restrictive or impose higher standards shall

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[3] In *Gardner v. Perry City*, 2000 UT App. 1, ¶ 20 n.7, the Utah Court of Appeals criticized the prejudice requirement as "impos[ing] a difficult – if not impossible – burden on a citizen who seeks to challenge the procedural legality of a city's land use decision." And the Utah Supreme Court, in *Suarez v. Grand County*, 2012 UT 72, ¶ 57 n.85, acknowledged that criticism but declined to address the validity of the requirement in that case. It therefore remains good law. Ultimately, however, the result in this case does not turn on whether plaintiffs have shown prejudice so as far as this case is concerned, the issue is academic.

[4] One of these, LMC § 15-7-2(C), states that one of the purposes of these ordinances is to "prevent overcrowding of the land and undue congestion of the population." This is the closest plaintiffs come to citing anything that seems to have any plausible applicability to the argument they make.

control." (LMC § 15-7-5(B)(1)). Plaintiffs do not connect their aggregation theory to any of these ordinances, and do not demonstrate that Park City's decision to grant the CUP violates any of them. Perhaps more important, as Park City points out in its response: First, permitted density is not determined in the manner articulated in plaintiffs' briefs; rather, density is determined by making a Floor Area Ratio calculation pursuant to a formula dictated by the LMC; the LMC prohibits a Floor Area Ratio in excess of 1.0; and it is undisputed that the Floor Area Ratio for this project is .999, less than the 1.0 maximum permitted under the LMC. Second, the three lots here were combined into one lot in a separate subdivision proceeding before the City. In that proceeding, plaintiffs lodged an objection, appealed to the district court, and that matter currently is on appeal to the Utah Court of Appeals. It is this subdivision proceeding, not the CUP proceeding, that established the basis for making the calculations for the Floor Area Ratio and therefore resulted in the development rights about which plaintiffs now complain. Therefore, any objections were or should have been raised in subdivision proceeding. For all of these reasons, plaintiffs' aggregation argument falls as a matter of law.

Plaintiffs' second argument is that the City violated the LMC because it failed to review each of the factors the LMC requires it to review before granting a CUP. Specifically, plaintiffs argue that mid-way through the approval process the developer submitted a "new design" and that new design was not subjected to a full review for each of the fifteen criteria necessary to grant a CUP. Park City disputes plaintiffs' characterization of the revisions made to the plans; while the city admits the building plans were new and different from the plans that had been partially approved by the City, they do not constitute a "new design". This is a fact question and because plaintiffs elected not to marshal the evidence, the court must accept Park City's position that the revisions were not a "new design". Even more basic than this, however, Park City's written findings of fact – which this court must accept as true – expressly address each of the fifteen criteria required by the ordinance as applied to the "new design". Plaintiffs

failure to challenge these findings is fatal to their argument regarding the City's alleged failure to properly review the design.

Plaintiffs' third and final argument is that the granting of the CUP is not consistent with the City's General Plan. The General Plan is, as its name suggests, a broad outline used for land use planning across the entire city. It contains, among other things, an exhibit that is zoning map that shows the various zoning designations. It is undisputed that the property at issue is located in the "RC" or Recreation Commercial District. Since the adoption of the General Plan, construction on the East side of Empire Avenue has consisted exclusively of single family homes. Allowed uses within the RC zone include bed and breakfast inns, boarding houses, hostels, hotels or motels with fewer than 16 rooms, etc. Thus, the multi-unit dwelling is a permitted use within the RC designation.

Plaintiffs argue that because the land use map identifies the area as "Low Density Residential" and the General Plan suggests the area should serve as a transition between the commercial area associated with the Park City Mountain Resort on one side and the lower density residential area on the other. The development of a multi-unit dwelling of the type contemplated here would not, according to plaintiffs, be consistent with a "Low Density Residential" designation or a transition from commercial to residential zones.

There are a number of problems with this argument. To begin, the zoning map upon which plaintiffs' argument hinges explicitly states that it is for "illustrative purposes only" undermining the weight that can be attached to the map and its application to a specific parcel of property. Second, the court has serious doubt about whether a General Plan, or a zoning map contained in a General Plan, rises to the level of a "law, statute, or ordinance" upon which a finding of illegality could be made. Plaintiffs provide no authority suggesting that a General Plan or zoning map, standing alone, has the force of an ordinance and this court has serious reservations about whether broad planning documents of this type could properly serve as the basis for a finding of illegality.

Plaintiffs seem to acknowledge this problem, and attempt to address it by citing to LMC § 15-1-10(D) which states, in part, that "[t]he City shall not issue a Conditional Use Permit unless the Planning Commission concludes that ... the Use is consistent with the Park City General Plan, as amended...." LMC § 15-1-10(D) does not, however, elevate the General Plan (or a zoning map) to the status of an ordinance; rather, it requires the decision making body to examine the proposed use and determine whether that use is consistent with the General Plan. Park City's final written decision does this, by stating "[t]he Use is consistent with the Park City General Plan, as amended." (R. 00003). At a minimum, the determination of whether a conditional use should be permitted on a particular parcel of property in light of a municipality's general plan is one where "some level of non-binding deference to the interpretation advanced by the local agency" is warranted. For all of these reasons, plaintiffs' general plan arguments likewise fail as a matter of law.

ORDER

Based on the foregoing, and for good cause appearing, plaintiffs' motion for summary judgment is DENIED; Park City's cross-motion for summary judgment is GRANTED; and the Park City Council's final decision dated February 10, 2011 is AFFIRMED.[5] This is the final order, and no other order is required.

DATED this 10th day of May, 2013.

DISTRICT COURT JUDGE

Judge Todd Shaughnessy

STATE OF UTAH
3RD DISTRICT COURT
SUMMIT COUNTY

[5] The developer of the property, defendant Valley of Love, LLC, joined in the cross-motion for summary judgment filed by Park City.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 110500209 by the method and on the date specified.

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Date: 5-10-13

Deputy Court Clerk